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## Domestic Relations—Divorce—Liability of Father for Necessary Expenses of Child in Mother's Custody, *Mahaney v. Corcker*, 98 A.2d 728 (Me. 1953)

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court in the principal case was acutely aware of these facts and therefore stressed the concept of a dual function of the corporation which prevailed in the eighteenth century: (1) To secure maximum profits for their stockholders; (2) To give support to the general community.<sup>22</sup> The court believed that the dire need of educational institutions for funds, the corporation's public obligations, and changing business methods justified considering the corporation's contribution to an educational institution as within its common law powers. Although the decision in the principal case is a departure from prior common law precedents, it manifests a sound public policy. In view of the fact, however, that the legislature had already adopted the same policy, the action of the court in deciding the case on a common law ground is unusual.

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DOMESTIC RELATIONS—DIVORCE—LIABILITY OF FATHER FOR NECESSARY EXPENSES OF CHILD IN MOTHER'S CUSTODY  
*Mahaney v. Crocker*, 98 A.2d 728 (Me. 1953)

The mother of a minor girl had been granted the temporary custody of the child pending a divorce action and the father had been ordered to pay her \$15.00 per week for the child's support. A physician performed an emergency appendectomy upon the daughter and a second operation to relieve infection that had developed. Subsequent to the appendectomy but prior to the second operation, the mother was granted an absolute divorce and the temporary orders pertaining to the custody and support of the child were continued in the final decree. The physician then brought an action against the mother for services rendered in performing both operations. In reversing a verdict for the mother, based on the jury's feeling that the father *should* pay, but unsupported by the evidence, the appellate court held that inasmuch as the legal custody of the child had been given to the mother, the law imposed upon her the primary obligation to furnish the child such medical and surgical care which thereafter became reasonably necessary.<sup>1</sup>

It is the prevailing rule that a father owes a legal as well as a moral duty to support his infant children until they reach majority.<sup>2</sup> Where

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ment to support a given enterprise as it did in 1929. Irving S. Olds, former chairman of the board for U.S. Steel Co. said,

[E]very American business has a direct obligation to support the free, independent, privately endowed colleges and universities of this country to the limit of its financial ability and legal authority. And unless it recognizes and meets this obligation, I do not believe it is properly protecting the long range interest of its stockholders, its employees, and its customers.

38 A.B.A.J. 999, 1000 (1952).

22. Dodd, *For Whom Are Corporate Managers Trustees*, 45 HARV. L. REV. 1145 (1932).

1. *Mahaney v. Crocker*, 98 A.2d 728 (Me. 1953).

2. 4 VERNIER, AMERICAN FAMILY LAWS § 234 (1936).

the father is divorced from the mother, and the child has been awarded to her custody by divorce decree which fails to provide for the child's support, the majority rule is that the father is still liable for the expenses incurred in maintaining it.<sup>3</sup> A definite split of authority exists, however, as to whether a divorce decree which orders the father to contribute a certain amount to the mother for support and maintenance of the child in her custody is the limit of the father's liability for expenses subsequently arising in providing necessities for the child.

Some courts state without discussing their reasons that the father's liability for the support of his child awarded to the mother's custody is dependent upon and limited by the terms of the decree.<sup>4</sup> Those courts which do discuss their reasons base their holdings upon the principle that the father, having been deprived of his common law right to the services and earnings of the child, is thereby exonerated from the correlative obligation to support it because the right to the services of the child and the duty to support it go together.<sup>5</sup> The father is not altogether relieved from his duty to support his child, but his common law obligation ceases and is replaced by the duty under the decree.<sup>6</sup> His duty then is limited by the decree which fixes the maximum and minimum amounts of his liability for the support of his child.<sup>7</sup> It has been stated that this result prevents endless litigation by third parties who have furnished necessities to the child when the father no longer has control of it.<sup>8</sup> Most of the courts which limit the liability of the father to the amount specified in the decree state that when unforeseen circumstances arise and additional expenses are incurred in furnishing necessities to the

3. *Broemmer v. Broemmer*, 219 S.W.2d 300 (Mo. App. 1949); *Gulley v. Gulley*, 111 Tex. 233, 231 S.W. 97 (1921); See Note, 15 A.L.R. 569 (1831).

4. *Gant v. Gant*, 209 Ark. 576, 191 S.W.2d 596 (1946); *Ryder v. Perkins*, 219 Mass. 525, 107 N.E. 387 (1914); *Dimond v. State*, 110 Neb. 519, 194 N.W. 725 (1923) (criminal action for failure to support child); See Note, 7 A.L.R.2d 491 (1949).

5. 2 BISHOP, ON MARRIAGE, DIVORCE & SEPARATION § 1222 (1891): "It seems to be a principle of the unwritten law that the right to the services of the children, and the obligation to maintain them, go together." *Accord*, *Lewis v. Lewis*, 174 Cal. 336, 163 Pac. 42 (1917); *Hess v. Slutsky*, 224 Ill. App. 419 (1922); *Hall v. Green*, 87 Me. 122, 32 Atl. 796 (1895); *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623 (1887); *Brow v. Brightman*, 136 Mass. 187 (1883).

6. *Creeley v. Creeley*, 258 Mass. 460, 155 N.E. 424 (1927); *Karminski v. Karminski*, 260 App. Div. 491, 23 N.Y.S.2d 141 (1st Dep't 1940); see *Gardine v. Cottey*, 360 Mo. 681, 710, 230 S.W.2d 731, 750 (1950).

7. *Harker v. Wolff*, 42 Ohio App. 540, 182 N.E. 592 (1931).

8. *Hall v. Green*, 87 Me. 122, 125, 32 Atl. 796, 797 (1895): "It would be unjust to allow both a common law remedy and the statutory remedy to exist at the same time, and it would operate too severely on a husband for him to be constantly exposed to action by his divorced wife and also by strangers to recover of him sums expended by them for the support of his children, over whom he is not allowed to exercise any control." *Accord*, *Karminski v. Karminski*, 260 App. Div. 491, 23 N.Y.S.2d 141 (1st Dep't 1940).

child, the mother's proper remedy, as suggested in the principal case,<sup>9</sup> is to seek a modification of the order in the original decree, enlarging the allowance granted to the child.<sup>10</sup> This remedy can be readily realized since the divorce court retains a continuing jurisdiction over the custody and support of the children.<sup>11</sup>

Other courts hold that the liability of the father to support his child is not limited by the decree of divorce awarding the child's custody to the mother and ordering him to contribute to its support. The reason generally given for their decisions is that it would be inequitable and unjust not to allow recovery to third parties or to the mother where extraordinary expenses have been incurred in furnishing necessities to the child.<sup>12</sup> Such additional expenses, as for medical services rendered for a child's unforeseen illness, have been held not to have been within the contemplation of the divorce court when it made the decree ordering the father to pay a definite sum for the child's support.<sup>13</sup> Where a divorce has been granted because of the father's misconduct, some courts hold that he should not be able to plead his own wrong as an excuse for relieving himself from the obligation to support his child.<sup>14</sup> It has also been held that the decree, although binding upon the parties to the decree so that the mother would be denied recovery at law for additional expenses, is not conclusive as to the rights of the children and third persons furnishing necessities to them since they were not parties to the dissension of the parents.<sup>15</sup>

In the principal case the court, by holding the mother primarily responsible for the support of the child awarded to her custody by a divorce decree, indicates that the father is not directly liable to a third person furnishing necessities to his child when he no longer has control of it. The fact that the emergency appendectomy was performed while the temporary order of the divorce court was in effect and that a final divorce decree had not yet been rendered by the court did not in any way extend the father's liability.

9. *Mahaney v. Crocker*, 98 A.2d 728, 729 (Me. 1953).

10. *Jaeger v. Jaeger*, 73 Cal. App. 128, 238 Pac. 139 (1925); *Dodge v. Keller*, 29 Ohio App. 114, 162 N.E. 750 (1927). *Contra*: *Gant v. Gant*, 209 Ark. 576, 191 S.W.2d 596 (1946) (can not modify decree for maintenance to be increased retrospectively).

11. *Robinson v. Robinson*, 268 Mo. 703, 186 S.W. 1032 (1916), *modifying judgment* 168 Mo. App. 639, 154 S.W. 162 (1913); 2 VERNIER, AMERICAN FAMILY LAWS § 95 (1932).

12. *Merrill v. Merrill*, 188 Tenn. 10, 216 S.W.2d 705 (1948); *Rose Funeral Home v. Julian*, 176 Tenn. 534, 144 S.W.2d 755 (1940); See Note, 131 A.L.R. 862 (1941) (construction of state statutes providing for joint obligation of parents to support children).

13. *Russell v. Russell*, 170 Miss. 364, 154 So. 881 (1934).

14. *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852 (1907); *Kommel v. Karron*, 152 Misc. 294, 273 N.Y. Supp. 226 (Sup. Ct. 1934).

15. *Barrett v. Barrett*, 44 Ariz. 509, 39 P.2d 621 (1934); see *Thompson v. Perr*, 238 S.W.2d 22, 24 (Mo. App. 1951).

The father certainly should not be held liable to a retaliatory mother or to profit-seeking third parties bestowing extravagant trivialities upon the child. However, a child is entitled to be provided with the necessities of life and if an unforeseen situation arises, such as an emergency appendectomy, in which large and extraordinary expenses are incurred in caring for the child, the father should be held responsible for the whole or a part of such expenses if the mother's income or the support allowance in the decree is insufficient to satisfy them. But as to the naturally foreseeable expenses in furnishing ordinary necessities such as food and clothing to the child, it would appear that the divorce court, in ordering the father to contribute a certain amount for the child's support, had taken these expenses into consideration and so the father's liability as to them should be limited by the decree. The question as to whether an expense for necessities given to the child is ordinary and foreseeable or extraordinary should be left to the discretion of the court making the divorce decree and having jurisdiction of the parties. Thus recovery by third parties for all expenses incurred on behalf of the child should properly be limited to the mother who can, when extraordinary expenses arise, seek a modification of the support order in the original decree for the purpose of recovery from the father.